24064

Supreme Court

OF THE

United States

OCTOBER TERM, 1903.

No. 263.

John D. Hooker,
Plaintiff in Error,
vs.
John Burr. A. W. Rhodes and W. A. Hammel,
Defendants in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

I.

Statement of the Case.

This suit was brought against the defendants John Burr, A. W. Rhodes and W. A. Hammel as defendants, the said John Burr having been the sheriff of the county of Los Angeles, state of California, at the time of the execution sale hereinafter stated, and W. A. Hammel, as his successor in the office of sheriff, to cancel the deed made by the said John Burr as sheriff,

to A. W. Rhodes under the said execution sale, and against Burr and Hammel to compel the execution of a deed to the plaintiff for the same property, the said A. W. Rhodes being made a party defendant because of his interest under the deed executed by the sheriff to him, and the facts out of which the right of action is alleged to have arisen were set forth in the original complaint, but more fully and more correctly in the amended complaint.

The original complaint appears in the transcript, pages 1 to 6, and the amended complaint, pages 15 to 22. So far as pertinent to the inquiry in this court, those facts are as follows:

On the 16th day of October, 1893, Anna P. Spencer and Ambrose H. Spencer, then being owners of certain property situated in the city of Los Angeles, county of Los Angeles, state of California, described as lot 3, and the southerly 17¾ feet of lot 4 in block 52 of the Huber tract according to a map of said tract recorded in the office of the county recorder of Los Angeles, in book 2, page 281 Miscellaneous Records [Trans. p. 17, par. 7], made their promissory note to one Jacob Swiggart for the sum of five thousand ($5,000) dollars, bearing date the 16th day of October, 1903, and at the same time executed a mortgage to Swiggart to secure the payment of the promissory note as therein provided. [Trans. p. 15, par. I of the amended complaint.]

This note and mortgage were assigned by Swiggart to Charles R. Bishop.

Subsequently, and before the commencement of the

action about to be mentioned, Ambrose H. Spencer died, and Frank M. Kelsey was appointed the administrator of his estate. [Tr. p. 16.]

Afterwards Bishop commenced a suit in the superior court of the county of Los Angeles, state of California, against Frank M. Kelsey as administrator of the estate of Ambrose H. Spencer, deceased, Anna P. Spencer, T. L. Stiles, Orange E. Dickey, James Gordon Spencer, Isabel Spencer, and others sued by fictitious names, to recover the amount due, and to foreclose the mortgage.

On the 14th of May, 1898, a judgment was entered in said cause whereby it was adjudged and decreed that there was due to the plaintiff upon the promissory note mentioned, the sum of six thousand, seven hundred eighty-two and 49-100 ($6,782.49) dollars, and that said sum was a lien upon the mortgaged premises, and also a judgment for the sale of the mortgaged premises for the payment of the sum so found to be due. [Tr. p. 16, par. 4.]

On the 16th of May, 1898, an execution was issued upon the said judgment, and the sheriff did, on the 13th day of June, 1898, sell to the plaintiff in error the said mortgaged premises, for the sum of nine thousand five hundred ($9,500) dollars, and a certificate of sale was issued to him.

At the time this mortgage was given, the statutes of the state of California provided for a redemption of real property from execution sale, and section 702 of the Code of Civil Procedure at that time was as follows:

"Sec. 702. The judgment debtor or redemptioner may redeem the property from the purchaser any time within six months after the sale, on paying the purchaser the amount of his purchase with two per cent. per month thereon in addition, up to the time of the redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount. And if the purchaser be also a creditor having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien with interest."

On March 27, 1895, the legislature amended this section 702 so as to provide that the judgment debtor or redemptioner might redeem the property from the purchaser any time within six months after the sale, on paying the purchaser the amount of his purchase with one per cent. per month thereon, up to the time of redemption, together with any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and if the purchaser be also a creditor having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien with interest.

Stats. of California, 1895, p. 226.

On February 26, 1897, the section was again amended by the legislature, the language of the section remaining the same except that under this last amendment referred to the time of redemption was extended to twelve months, and the amount to be paid for re-

demption should be the amount of the purchase with one per cent per month thereon in addition up to the time of redemption, together with the amount of any assessment or taxes which the purchaser might have paid, etc.

Stats. of 1897, p. 41.

The only changes made in these amendments of the statute referred to were, the first as to the amount to be paid, the second as to the time of redemption.

One E. R. Nichols brought a suit in the superior court of the county of Los Angeles, state of California, against Anna P. Spencer, to recover a sum alleged to be due to the plaintiff from her, and such proceedings were had in that action that on the 30th day of September, 1897, Nichols recovered a judgment against the said Anna P. Spencer in the said suit, for the sum of one thousand fifteen and 30-100 ($1,015.30) dollars and costs, which judgment was docketed in the superior court on the 1st day of October, 1897. [Tr. p. 18, par. X.] Claiming that under this judgment and as assignee of Nichols to be a redemptioner under the statutes of California, Rhodes did, on the 12th day of December, 1898, deliver to John Burr, the sheriff of the county of Los Angeles, who had made the sale of the said property to the plaintiff, a check bearing date the 12th day of December, 1898, for the sum of ten thousand and seventy ($10,070) dollars, which check was drawn on the First National Bank of Los Angeles, by Clark & Bryan, and a copy of which is set forth in the amended cmplaint, to

which we are now referring. That copy, after the date, is:

> "Pay to the order of John Burr, sheriff, $10,070 ten thousand seventy dollars. To the First National bank, Los Angeles, Cal.
> (Signed) "CLARK & BRYAN."

A two cent revenue stamp was placed on the said check.

The amount of this check, it will be seen, is the amount of the purchase money paid by Hooker, to-wit, $9,500, with one per cent. per month interest from the time of the sale, and he delivered this check to the sheriff on the 12th day of December, 1898, together with a notice addressed to the plaintiff, Hooker, as such purchaser, that he, Rhodes, did redeem the said property from the said sale, and in such notice made the statement that he redeemed as a judgment creditor of Anna P. Spencer, and not otherwise.

There was no other or different payment of any sum whatever ever made to the sheriff for the redemption of said property, and it is alleged that the check was no payment to the sheriff, and was insufficient in amount to effect the redemption, and it was not payable in gold coin at all. [Tr. pp. 17-18, par. IX.]

On the 10th of June, 1897, prior to the recovery of the judgment by Nichols, which judgment had been assigned to Rhodes, Anna P. Spencer had executed and delivered to Orange E. Dickey a conveyance of this land which had been sold to Hooker. [Tr. p. 19, par. XIII.]

And through Dickey the property had passed to Charles J. Shepherd (*id.*).

There are allegations as to the invalidity of this Nichols judgment, but they are not questions of a federal character, and having been decided by the state court against us, we suppose it is conclusive.

At the November election of 1898 W. A. Hammel, one of the defendants, was elected sheriff of the county of Los Angeles, and qualified as such sheriff on the first Monday in January, 1899, and became the successor in that office of John Burr, and on the 18th of February, 1899, Hammel, as such sheriff, executed an instrument purporting to be a deed of conveyance of the property to A. W. Rhodes as such redemptioner from the said sale, and Rhodes is claiming to be the owner of the property under that deed of conveyance.

It is then alleged that this conveyance by Hammel as the successor of Burr is illegal and void. Furthermore, that the plaintiff has never been paid the sum so delivered to the sheriff for the purpose of effecting its pretended redemption.

Prior to the commencement of the action, the plaintiff tendered to Hammel, the present sheriff of the county of Los Angeles, the fee for making a sheriff's deed to the property sold, and demanded of Hammel the execution of a deed of conveyance to the plaintiff as the purchaser at the said sale, and he also tendered the amount to John Burr, the former sheriff of the county, and made the same demand upon him, and the amount of the fee was deposited in the court to be delivered to either Hammel or Burr upon the execution of the deed demanded. [Tr. pp. 20-21.]

The plaintiff further alleged and proved that the check above mentioned which was delivered to Burr by Rhodes was held by Burr until the term of his office expired, and he indorsed it to his successor. And at the time of the filing of this amended complaint, which was on November 20, 1899 [Tr. p. 22, fol. 38], this check remained in the possession of the sheriff, and the sheriff had never obtained the money upon it, nor had he presented the check or had the money transferred to his name in the bank.

The findings of the court will be found at pages 28-29.

The court found that on the 10th of June, 1897, Anna P. Spencer made this conveyance to Dickey, and through him to Charles J. Shepherd, for the purpose of, and intended it, as a security to Charles J. Shepherd for the debt that she owed him, and that the deed did not divest the title of Anna P. Spencer to the said property.

That Rhodes was the owner of the judgment of Nichols against Spencer on the 13th of December, 1898, and that he did, on that day, redeem the said property.

That Rhodes offered the sheriff $10,070 in gold coin of the United States in payment of the redemption of the property, and that the check delivered by Rhodes to the sheriff in making the redemption had been paid. [Tr. pp. 28-29.]

Now the original complaint in this cause was filed March 14, 1899 [Tr. p. 6]; the amended complaint, as already stated, was filed November 20, 1899. And

while the finding that the check had been paid was true at the time the finding was made, which was the 11th of April, 1900, it never was paid until after the amended complaint was filed, and it was charged that the money had never been paid to the sheriff for redemption.

These facts appear without contradiction in the statement on motion for a new trial which was made in the superior court of Los Angeles, and denied.

And it was finally admitted by the parties that the check was cashed on the 25th or 26th of November, 1899, nearly a year after it was delivered to the sheriff. [Tr. pp. 101-102.]

An appeal was taken from the judgment and order denying the new trial, to the supreme court of the state of California, and was heard in department 2, where the judgment and order appealed from were affirmed. [Tr. pp. 114-120.]

A petition for a rehearing was filed by the plaintiff, Hooker, and was denied December 20, 1902. [Tr. p. 120.]

And the order denying it was filed December 22, 1902.

On February 24, 1903, the plaintiff, John D. Hooker, petitioned the Chief Justice of the Supreme Court of California for a writ of error to this court. [Tr. pp. 121-127.]

Was allowed the 24th of February, 1903. [Tr. p. 134, fol. 239.]

The bond given and approved. [Tr. pp. 133-134, fols. 236-238.]

And the Honorable Chief Justice issued a certificate showing that the cause was decided in the supreme court on the 21st of November, 1902; that within 20 days after the filing of the said judgment, plaintiff filed in the supreme court of California, his petition for a hearing of the cause in bank, and such petition was considered and acted upon by the supreme court, and on the 20th day of December, 1902, was denied. And thereupon the judgment became final, and the remittitur was issued. That the rules and practice of the court provided and required that where a cause was heard and determined in department, and judgment given therein, a petition for a hearing in bank should be filed within 20 days after said decision. [Tr. pp. 127-128, fols. 226-227.]

II.

ERRORS ASSIGNED.

The errors relied upon by the plaintiff in error on this writ are the following:

1. The supreme court of the state of California erred in deciding that the amendment to Sec. 702 Code of Civil Procedure, passed by the legislature of the state of California, and approved on the 26th day of February, 1897, whereby it was provided that a judgment debtor or redemptioner might redeem property from the purchaser at an execution sale at any time within twelve months after the sale on paying the purchaser the amount of his purchase, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, with

interest thereon, was valid as to contracts made before the said statute was passed.

2. The supreme court of the state of California erred in deciding that the said statute was valid as to the redemption from the sale made to the plaintiff herein under an execution issued under the judgment given in the suit brought by Charles R. Bishop against Frank M. Kelsey, as the administrator of the estate of Ambrose H. Spencer, deceased, Anna P. Spencer, T. L. Stiles, Orange E. Dickey, James Gordon Spencer, and Isabel Spencer, on the 14th day of May, 1898, which judgment was recovered upon a promissory note given on the 16th day of October, 1893, and a mortgage made on the said date to secure the payment of the said note, although the said note and mortgage were given long prior to the said amendment to the said statute, and though said amendment reduced the amount to be paid from two per cent. a month on the purchase money to one per cent.

3. The court erred in holding that the amendment to section 702 of the Code of Civil Procedure of the State of California, made after the note and mortgage were executed by the said Anna P. Spencer and Ambrose H. Spencer to Jacob Swiggart, and assigned by him to the said Bishop, and upon which note and mortgage the said judgment was recovered whereon the execution was issued and the sale made to the said John D. Hooker, was valid and not in violation of the provision of the constitution of the United States prohibiting any state from passing any law impairing the obligation of a contract, notwithstanding the said

amendment reduced the amount tc be paid upon said redemption.

4. The supreme court of the state of California erred in deciding that the statute, to-wit, section 702 of the Code of Civil Procedure of the state of California, though as it existed at the time the note and mortgage were executed by the said Anna P. Spencer and Ambrose H. Spencer provided that the judgment debtor or redemptioner might redeem the property from the purchaser at any time within six months after the sale on paying the purchaser the amount of his purchase with two per cent. per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser might have paid thereon after purchase, and interest on such amount, and though the said statute, to-wit, the said section 702 of the Code of Civil Procedure of the state of California was amended after the said contract, to-wit, the said note and mortgage, was made, reducing the amount to be paid, and declaring that the judgment debtor or redemptioner might redeem the property at any time within twelve months after the sale on paying the purchaser the amount of his purchase with one per cent. per month thereon in addition, up to the time of redemption, together with any assessment or taxes which the purchaser might have paid thereon after purchase, and interest on such amount, yet the said statute as so amended was valid, and that a redemption of the property from the sale upon an execution issued upon a judgment recovered upon the said note and mortgage, might be redeemed, and was redeemed by the

payment of the purchase money with interest at one per cent. per month from the date of the purchase, together with the other payments mentioned, and that said statute was not in violation of the provisions of the constitution of the United States prohibiting any state from passing a law impairing the obligation of a contract.

5. The supreme court of the state of California erred in deciding that an act of the legislature of the state of California passed after the execution of the note and mortgage given by Anna P. and Ambrose H. Spencer to Jacob H. Swiggart, upon which the judgment was recovered and a sale upon an execution thereof made to this plaintiff, providing that a redemption could be made by paying a less amount than was required by the laws of the state of California at the time said contract was made, was valid and not in violation of the constitution of the United States.

6. The supreme court of the state of California erred in deciding that the amount paid by the defendant Rhodes to the sheriff of the county of Los Angeles for the redemption of the said property from the sale made to the said John D. Hooker under the execution issued upon the judgment aforesaid was sufficient to effect a redemption, in that the said amount was fixed by a statute of the state of California passed subsequently to the execution of the said note and mortgage and was a less amount than was required under the statutes of the state of California to make a redemption at the time the said note and mortgage were made.

7. The supreme court of the state of California

erred in deciding that an act of the legislature of the state of California providing for a redemption from a sale under execution by the payment of a less amount than was required by statute at the time a note and mortgage given to secure the same were made, is valid and not in violation of the provision of the constitution of the United States prohibiting any state from passing a law impairing the obligation of a contract.

8. The supreme court of the state of California erred in deciding that the act of the legislature of the state of California passed in 1897, amending section 702 of the Code of Civil Procedure of the state of California, was valid as to redemption from execution sales upon judgments recovered upon contracts made prior to the passage of the said amendment, and which amendment reduced the amount to be paid below that which was required by the statute existing at the time of the contract.

9. The supreme court of the state of California erred in deciding that the amount of the check delivered to the sheriff of Los Angeles county for the redemption of the said property from the sale made to the plaintiff in error, John D. Hooker, was sufficient in amount to effect a redemption.

10. The supreme court of the state of California erred in giving judgment for the defendants in this action and against the plaintiff.

11. The supreme court of the state of California erred in affirming the judgment of the superior court in this cause.

12. The supreme court of the state of California

erred in deciding that the said Rhodes paid to the plaintiff, John D. Hooker, any sum of money whatever within the time prescribed by the statutes of the state of California for the redemption of said property.

13. The supreme court of the state of California erred in deciding that the defendant, A. W. Rhodes, did make a valid redemption from the sale of the property in controversy made to the plaintiff in error upon the execution issued upon the judgment aforesaid in this, that no money was paid within the time allowed for the redemption, nor was the amount paid sufficient, and plaintiff in error was deprived of his property without due process of law, in violation of the fourteenth amendment to the constitution of the United States.

III.

POINTS OF LAW AND FACT.
Brief of the Argument.

1. The laws existing at the time a contract is made, enter into and become a part of it.

United Bank v. Board of Commissioners, 90 F. 7. 9;

Barnitz v. Beverly, 163 U. S. 118; 41 L. Ed. 93, 98;

Deck v. Whitman, 96 F. 884-885.

And the laws so existing at the time of the contract are the measure of its obligations.

Bronson v. Kinzie, 1 How. 319; 11 L. Ed. 143, 144, 146.

We quote from this case the following passage:

> "As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. The money due was indeed to be paid in New York. But the mortgage given to secure the debt was made in Illinois for real property situated in that state, and the rights which the mortgagee acquired in the premises depended upon the laws of that state. In other words, the existing laws of Illinois created and defined the legal and equitable obligations of the mortgage contract."
>
> 11 L. Ed. pp. 144-145.

The same effect is

> McCracken v. Hayward, 2 How. 613; 11 L. Ed. 397, 399.

And the laws so existing at the time of the contract are as completely a part of the contract as though they had been written therein.

> White v. Hart, 13 Wall. 653; 20 L. Ed. 685, 688.

And in this case it is further said:

> "Nothing can be more material to the obligation than the means of enforcement. Without the remedy, the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against invasion. The obligation of

a contract 'is the law which binds the parties to perform their agreement.' "

Rees v. City of Watertown, 19 Wall. 107; 22 L. Ed. 72, 76;

Toledo etc. R. R. Co. v. Hamilton, 133 U. S. 301; 33 L. Ed. 905, 908;

Central Trust Co. v. Charlotte C. & A. R. Co., 65 F. 287, 289;

Southern Ry. v. Bouknight, 70 F. 442, 446.

We quote the following from the opinion:

"The Circuit Court was of opinion that all contracts are made with reference to the law of the state in which the subject matter of the contract is and in which the contract is made. This certainly is true with regard to mortgages by a railroad corporation. The law enters into and becomes a part of the contract as if it were there in express terms."

The law in force at the time a mortgage is executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of the mortgage.

East Tennessee, Va. & Ga. R. Co. v. Frazier, 139 U. S. 288; 35 L. Ed. 196.

2. The redemption laws existing at the time of the execution of a mortgage constitute a part of the obligations of the mortgage contract.

See cases above cited. Also

1 Jones on Mortgages, sec. 663, where it is said that the law in force at the time of the delivery of the mortgage governs its validity and construction so far as these are affected by statute.

2 Jones on Mortgages, sec. 1051, after stating the same proposition and referring to section 663, the author says:

> "It is equally true that the law existing at the time of the making of the mortgage governs in respect to redemption and foreclosure after a foreclosure sale."

And in the same section, that a statute giving a right of redemption for two years after the sale, is unconstitutional and void as applied to mortgages executed prior to the enactment of the statute, as impairing the obligation of the contract. In like manner a law shortening the time of redemption from two years to one year after sale, is unconstitutional in respect to mortgages existing at the time it took effect. And

2 Jones on Mortgages, sec. 1321, from which we quote the following:

> "The law in force when the mortgage was executed must be followed in foreclosing it, though there be a change in the meantime. The remedy so provided becomes a part of the contract of the parties, and any change by statute substantially affecting it to the injury of the mortgagee is held to be a law impairing the obligation of the contract within the meaning of the constitution of the United States."

3. Redemption laws existing at the time of a purchase, whether under execution or at a tax sale, become a part of the contract, and any law impairing the obligation of that contract is in violation of the provision of the constitution of the United States prohibit-

ing any state from passing a law impairing the obligations of a contract.

Thresher v. Atchison, 117 Cal. 73.

4. The test as to whether a contract has been impaired, is whether its value has by legislation been diminished.

It is well settled that the provision of the constitution of the United States prohibiting a law impairing the obligation of a contract, does not deal with any question of more or less. It is not the degree, or manner, or cause, of the impairment, but a question simply of whether its obligation has been to any degree impaired.

Heath & Milligan Mfg. Co. v. Union Oil & Paint Co., 83 F. 777.

A law shortening or extending the time of redemption as it existed when a mortgage was made, does impair the obligation of the contract, and is void.

Barnitz v. Beverly, 163 U. S., *supra;*

Savings Bank of San Diego Co. v. Barry, 126 Cal. 413, 417;

Hollister v. Donahue, 78 N. W. 960;

State v. Sears, 46 Pac. 785.

Statute providing for a stay of execution for a year on a decree for a foreclosure of a mortgage made before any such law existed, is void.

Swinburne v. Mills, 50 Pac. 489.

Statute authorizing redemption from a sale under a foreclosure of a mortgage when no such right ex-

isted when the mortgage was made, impairs the obligation of the mortgage contract.

Paris v. Nordburg *et al.*, 51 Pac. 799.

Statute providing that upon making of an assignment by a debtor within ten days after the levy of an attachment, the attachment and levy shall be dissolved and the property attached or levied upon, turned over to such assignee or receiver, was held as to indebtedness contracted before the passage of the act to impair the obligation of the contract.

Heath & Milligan Mfg. Co. v. Union Oil & Paint Co., 83 F. 776;

State v. Gilliam, 45 Pac. 661; 33 L. R. A. 557;

Second Ward Savings Bank v. Schranck, 39 L. R. A. 575;

Lead & Color Works v. Union Oil & Paint Co., 42 L. R. A. 331.

Statutes staying a sale under a foreclosure, for a year, and requiring that it be for 80% of the appraised value, impairs the obligation of a mortgage contract made prior to its passage.

Bettman v. Cowley, 40 L. R. A. 819.

Act providing for the redemption of real property sold on execution, so far as intended to apply to sales on judgments rendered on contracts at and before its passage, are in violation of the contract.

Scobey v. Gibson, 79 Am. Dec. 490.

A provision of the constitution, or a legislative act,

which substantially changes the remedies, is utterly void.

Gunn v. Barry, 82 U. S. 610; 21 L. Ed. 212.

A law fixing the amount of percentage to be paid in order to effect a redemption of land from a sale under execution, in force at the time of the sale, forms an element of the purchase at the sale, and constitutes a term in the contract under which the purchaser paid his money to the officer, and the legislature has no power to impair the obligation of such contract by diminishing the amount subsequently to the sale.

Thresher v. Atchison, 117 Cal. 73.

Redemption of land sold to the state for delinquent taxes, is governed by the law in force at the date of the sale.

And it is beyond the power of the legislature, after the tax sale, to impose more onerous conditions upon the right to redeem than those which existed when the sale was made. And the retroactive provision of such act is unconstitutional and void in so far as it purports to impair the vested right of redemption which is a condition of the contract of purchase when made.

Teralta etc. Land Co. v. Shaffer, 116 Cal. 518.

5. Mortgage contract is not merged in the judgment, and a purchaser under execution sale under foreclosure decree is in privity with the mortgage contract.

Romig and Harding v. Gillett, decided in this court November 17, 1902, reported in the Advance Sheets of date December 15, 1902, October Term of that year, No. 52, p. 40, 42.

In that case a motion to vacate a judgment for foreclosure and all proceedings subsequent thereto, upon the ground that the moving party had not been properly served with process, was granted, and an order made that she be put in possession of the premises, which order and judgment of the trial court was affirmed by the Supreme Court of the territory, whereupon the case was brought before this court upon an appeal. And the court said, among other things:

> "Assuming that that section is not fully applicable because of the defect in the affidavit, yet the appellee comes into a court of equity seeking relief against the foreclosure of a mortgage. In such a case there are almost always certain conditions of relief. If the mortgage be valid, the rights of the mortgagee and those claiming under him are to be protected. Generally such rights are protected by requiring payment of the mortgage debt, and granting a right of redemption. It is true that this right of redemption is a favored right. * * * But it is only a right of redemption which in this case and under the facts disclosed the appellee is entitled to. She does not pretend * * * that the mortgage was invalid, or that it had been paid. She claims by a deed subsequent to the mortgage, and simply insists that she has not had her day in court, and therefore her rights, which, so far as appears, are only the rights of redemption, have not been cut off. *Harding, as the grantee of the purchaser at the foreclosure sale, stands in the shoes of the mortgagee.*"

In Bryan v. Brasius, 162 U. S. 415, 40 L. Ed. 1022, 1023, it was held that a mortgagor of land could not

recover in ejectment against a mortgagee in possession after breach of the condition, or against persons holding possession under the mortgagee. And also that an irregular judicial sale made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale all the rights of the mortgagee as such.

In 2 Jones on Mortgages, section 1654, the author says:

> "As the title of the purchaser relates back to the time of the execution of the mortgage, it does not matter to him what disposition the mortgagor may afterwards have made of the property if the foreclosure is perfect. All conditions and reservations and easements, as well as all incumbrances or liens, he may have afterwards imposed upon the property are extinguished. In this respect the purchaser's rights are the same whether the sale be under a decree of a court of equity, under a judgment in *scire facias*, or under a power in the mortgage or trust deed. The title takes effect by virtue of the original deed; the sale carries that title, and cuts off all liens and interests created subsequent to the mortgage.
>
> "Title acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights. If all subsequent purchasers and incumbrancers are made parties to the bill, the title under the mortgage foreclosed is perfected to an absolute one. In such case the purchaser acquires the title of the mortgagee, and also the title of the mortgagor as it stood at the time of the making of the mortgage."

In Vallejo Land Association v. Viera, 48 Cal. 572, the court said that although in some sense the mortgage deed merged in the decree, it yet remained a muniment of title which passed to the purchaser at the mortgage sale, to be looked to not only for the purpose of ascertaining the point of time at which the mortgage lien attached, but also the estate purporting thereby to have been conveyed by way of mortgage.

To the same effect is

People's Savings Bank v. Hodgdon, 64 Cal. 95;
Golden State etc. Iron Works v. Davidson, 73 Cal. 389, 391-392.

In Wilson v. White, 84 Cal. 239, the court said:

"Upon the authority of the foregoing cases, it must be held that the 'Warnen' deeds transferred the title. And it makes no difference in the result whether the defendant was a party to the foreclosure of the Bradley mortgage or not. If he was a party, and the decree cut off his interest, it is manifest that whatever rights he has in the property he got under the deed from 'Warnen,' which was ample consideration for what he promised to pay. If he was not a party, then, although his rights under the contract were not cut off, yet the purchaser is *in equity the assignee of the debt secured by the Bradley mortgage.*"

Carpentier v. Brenham, 40 Cal. 221;
Rumpp v. Gerkens, 59 Cal. 496;
Henderson v. Grammar, 66 Cal. 335.

"And a conveyance by him or his grantee operates as a release of this right, and consequently was consideration for a promise to pay for it."

6. The appellant, John D. Hooker, the purchaser at the foreclosure sale, is in privity with the mortgage contract, and entitled to invoke the protection of the constitution of the United States against any laws impairing the obligation of that contract.

The decisions of the Supreme Court of the state of California have, as it seems to us, determined in every way that the laws existing at the time the contract is made enter into the contract, and become a part of it, and cannot be affected by any subsequent legislation.

In Allen v. Allen, 95 Cal. 184, 196, the court, having then before it a question as to whether suit was barred by the statute of limitations of this state, and the fact being that the loan had been effected in the state of New York, and an absolute deed to real property in California given to secure the payment of it, and the suit being brought here in California, said:

> "In the solution of the question presented as to the effect of the deed, we must read as a part of the contract, the laws of this state existing at the time the contract was made * * * ; although the nature and the construction of the contract of loan, which was made in New York, are determined by the latter state."

Further along, on page 197, they show that at the time this conveyance was made, a deed, absolute in form, to real property situated in this state, though intended as a mortgage, transferred the legal title, and there was left in the person executing it a mere equity of redemption, and whenever the debt to secure which the deed was made became barred by the statute of limitations, the right to redeem was barred.

In Savings Bank of San Diego v. Barrett, 1[illegible] 413, 417, the court said:

> "The amendment of section 702 of the Code of Civil Procedure in 1895 [Stats. 1895, p. 226], extending the time for redemption from sales under execution to one year, has no application to sales under the foreclosure of a mortgage executed prior to the enactment of this statute."
>
> Citing Barnitz v. Beverly.

In Benson v. Bunting, 127 Cal. 532, 534, the court said:

> "In 1892, when the mortgage was executed, the statute provided that redemption might be made at any time 'within six months after the sale.' [Code Civ. Proc., sec. 702.] This section was amended February 26, 1897, by extending the time for redemption to 'twelve months,' the amendment to take immediate effect; and in the second count it was alleged, in substance, that all the parties understood and agreed that said amendment, which was passed and took effect before the decree was entered in the foreclosure case, controlled, and that under it the time for redemption was extended to twelve months. It is conceded by plaintiffs that the statutory time within which redemption must be effected is fixed by the statute in force at the time the mortgage is executed, and not by one subsequently enacted, and that, under the statute, they should have redeemed within six months from the date of the sale."

In Malone v. Roy, 134 Cal. 344, after saying that at the time the mortgage was executed, the statute gave the judgment debtor six months within which to re-

deem, and referring to the change made by the act of February 26, 1897, in section 702 of the Code of Civil Procedure, and after saying that the only question is which statute governs, they held that it was the statute existing at the time that the mortgage was given, and cited Haynes v. Tredway, and Barnitz v. Beverly as quite sufficient authority upon that subject.

Now, in Haynes v. Tredway, 133 Cal. 400, this court had under consideration this question, and gave more attention to it than has been thought necessary since that decision or before, until the present case.

There the attempt was made to distinguish this Tredway case on this ground, that the purchaser at the foreclosure sale, and who was also the mortgagee, bid in the property at an amount in excess of his entire claim against the defendant. It was claimed that for that reason he had certainly got all that he was entitled to under his mortgage contract. The Supreme Court not only held that it was the statute in existence at the time the mortgage was executed, and not that in existence at the time of the sale, that controlled, and that the supposed distinction arising out of the question of whether a greater or less amount than that due was bid for the property was of no effect, they used such language in the opinion as shows that there can be no possible question of the ground upon which that case was proceeding, and therefore an index to all the other cases, even though they may not be so explicit in their statement of the principle. Said the Supreme Court [133 Cal. p. 402]:

> "It is thus conceded that if plaintiff had been a purchaser for a less amount, the statute as

amended allowing the mortgagors twelve months to redeem would have been, as to him, unconstitutional, *because impairing the obligation of his mortgage contract*; but it is asserted that by reason of the fact that the purchaser's price exceeded the amount of his claim in full, the obligation of the *mortgage contract* was in no sense impaired, and therefore the amended statute, as to the purchaser, is constitutional. The court is not prepared to say that the constitutionality of an act can be tested in this way. Indeed, we see no difference in principle, when testing the constitutionality of this act, whether the purchaser bid in the property for an amount less than his claim, or bid a sum in excess of that claim. *By the mortgage contract incorporating therein the statute of redemption existing at the time,* the agreement of the mortgagor was that the purchaser at the foreclosure sale, in case of default, should be entitled to the possession of the property six months after the sale, in case no redemption was had. In another form, it may be said that the agreement of the mortgagor was, that the purchaser at the sale may have title to the property, subject to a right of possession thereafter in the mortgagor for six months. *That was the contract in this case,* and the necessary result of giving the amended statute effect here is to give the mortgagor the right to the possession of the property for twelve months after the sale. It is thus patent upon its face that a statute extending the right of possession in the mortgagor to a period of twelve months is a substantial impairment of the contract limiting the right of possession to six months."

The court, after much more in the opinion, and citing Barnitz v. Beverly, and quoting liberally from it, shows us subsequently what was meant by the learned justice when he said that they did not think that the constitutionality of a statute could be tested that way. The reasons given why it could not be so tested will be found at pages 403-404, and they are substantially that the constitutionality of a statute with reference to some particular contract is to be tested by looking at the statute itself, and the contract, the obligations of which are supposed to be impaired. And it is either a valid statute and does not impair the obligation of the contract when it is passed, or it never is; and it is invalid and unconstitutional for the reason that it does impair the obligation of the contract when it is passed, or it never can become so. Therefore, whether the statute is or is not constitutional with respect to a particular contract, cannot be made to depend upon contingencies which may or may not happen in the future, such as whether, when a judgment is entered and execution, and a sale made, the purchaser shall bid more or less than the contract debt. If it was unconstitutional before he made the bid, it did not become constitutional by reason of the bid.

We submit that the reasoning is as conclusive as the proposition is itself obvious.

In that case also the court said that the defendants rely upon the case of Connecticut Mutual Life Insurance Co. v. Cushman, 108 U. S. 51, and they quoted from Barnitz v. Beverly this clause:

"The case of Conn. Mut. Life Ins. Co., 108 U.

> S. 51, does not collide with the previous and subsequent cases. There the new statute did not lessen the duty of the mortgagor to pay what he had contracted to pay, nor affect the time of payment, nor affect any remedy which the mortgagee had by existing law for the enforcement of his contract."

And Justice Garoutte continuing said:

> "Possibly there is language in the insurance company case which does 'collide' with Barnitz v. Beverly. * * * But if so, the collision only results in injury to the earlier case."

Thus stood the law as interpreted by the Supreme Court of the state of California as well as by this court when this cause arose and was presented to the Supreme Court of California. In none of these decisions, unless in the Connecticut Life Insurance case, is there the slightest intimation that one part of the laws providing for redemption existing at the time the mortgage is made, enter into that mortgage contract and become a part of it, and that other parts of the law do not so enter into it. Of course the question of whether the obligation of the contract is impaired in the sense of the constitutional provision by subsequent legislation may depend upon facts of the particular case, but if it be held that such subsequent legislation does not impair the obligation of the contract, though changing the laws in some respects, it is only because that change does not affect any substantial right existing under the laws at the time the mortgage is made. In other words, the rule never has been that there can be no change in the laws for the

redemption from execution sale made under a decree foreclosing the mortgage, or that any such law will be unconstitutional, but only those which impair the obligation of the contract, and if they do impair it in any degree, they are void.

Now we respectfully submit that an amendment to the law whereby the amount to be paid is increased or diminished, is a law impairing the obligation of the contract. That no distinction can be made between the time of redemption and the amount to be paid for redemption. That is certainly the rule in this state. We have already called attention to the cases upon this subject. Thus in Thresher v. Atchison, 117 Cal. 73, 74, the court say:

> "Cooley, in his treatise on Constitutional Limitations, page 353, says: 'A law is void which extends the time for the redemption of lands sold on execution, or for delinquent taxes after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is that he shall have the title at the time when provided by the law; and to extend the time for redemption is to alter the substance of the contract as much as would be the extension of the time for payment of a promissory note.'"
>
> *Id.* 74-75.

That ended the quotation from Cooley, and the court quoted from Freeman on Executions, sec. 315, this clause:

> "But the right of a purchaser to a conveyance, or to repayment at the termination of the period allowed for redemption, is deemed to rest upon

> a contract which the legislature will not be permitted to impair. Hence, while the time for redemption may probably be shortened, it certainly cannot be prolonged by any law enacted after the sale."

That ends the quotation from Mr. Freeman. Then says the court:

> "The same principles which render void an act extending the time for redemption after the sale has been made will render void an act reducing the amount of money required for a redemption from such sale."
>
> 117 Cal. 75.

In Teralta Land etc. Co. v. Shaffer, 116 Cal. 518, already cited, the court held the same thing with respect to redemption of land sold for delinquent taxes. To be sure, in those cases, and especially the tax case, the contract does not exist until the purchaser buys, and the laws for the redemption of property sold for taxes at the time he purchased constitute the law of his contract, and any change in such laws impairs the obligations of the contract.

We are not citing these cases as determining anything as to what the contract of Hooker, the appellant, is. We only say that whatever may be the contract, it is, by the decisions of the Supreme Court of California, determined that the laws for the redemption of property from the sale, existing at the time the contract is made, are a part of the contract, and that any law either extending or shortening the time of redemption, or increasing or diminishing the amount to be paid, is in violation of that contract. If the Supreme

Court of California be correct, then there is nothing left of this case except this question, What was Hooker's contract? Can he invoke the laws as they existed at the time the mortgage was made, or must he show that the laws as they existed at the time he purchased at the sale were subsequently changed to his detriment? Or, in other words, are the redemption laws as they existed when the contract of mortgage was made, a part of Hooker's contract of purchase? Is he in privity with that mortgage contract to the extent that he is protected by its terms, or is his own purchase the contract, and only contract, which he has ever made, and the obligations of which the state cannot impair?

The answer is found in the cases which we have already cited. Either the laws regulating redemption at the time of the mortgage are a part of Hooker's contract or they are not. If they are not, then pray what more reason would he have to complain of the extending of the time after the execution of the mortgage but before his contract of purchase, any more than to complain of the reduction in the amount to be paid? When he bought, the amendment to section 702 had been passed and the time for redemption was fixed for one year. When he purchased, the amount to be paid was the purchase money and interest at one per cent. a month. Nobody denies that if the laws existing at the time the mortgage was made were a part of his contract, a reduction of the amount is prohibited by the constitution of the United States just as much as the extension of the time, and nobody denies that in so far as the subsequent law extended the time of re-

demption, it was in violation of the obligations of the contract of the purchaser, as well as the mortgagee, which purchaser stood as the assignee of the mortgagee and entitled to all the protection that the mortgagee was entitled to. How, then, can it be said that though the plaintiff in error is entitled to the protection of the redemption laws with regard to the time of redemption, yet as to the amount, he is governed by another law, and one passed subsequently to the execution of a mortgage? It never would have been imagined that this amendment to section 702, made after the mortgage contract, would not have been void as to this contract in toto except for a remark in Barnitz v. Beverly, concerning the case of the Connecticut Mutual Life Insurance Company against Cushman, 108 U. S. 50. Mr. Justice Henshaw, in delivering the opinion of the Supreme Court of California in this case puts his decision entirely upon that ground. He says in the opinion [see Trans. pp. 118-119],

> "It is next contended that the redemption was insufficient for the amount, that the law at the time of the making of the mortgage entered into and became a part of the contract; that by that law the redemptioner was required to pay two per cent. per month in addition to the purchase money, while it is an admitted fact in this case that but one per cent. was paid. In brief, it is contended that to permit section 772 of the Code of Civil Procedure as amended in 1879 to operate upon the contract, is to impair its obligation. Herein especial reliance is had upon the case of Barnitz v. Beverly, 163 U. S. 118, which is said to be conclusive upon the question. In the earlier

case of Con. M. L. I. Co. v. Cushman, 108 U. S. 50, that same august tribunal, having under consideration a case identical in principle to the one here in question, wherein the rights of the purchaser were involved, held that a law passed subsequent to the mortgage and reducing the interest to be paid to a purchaser at such sale was operative and did not interfere with the rights of the purchaser whose contract did not exist until the time of the sale, and was governed by the laws in force at such time. Much nice reasoning is indulged in here to show that the principle declared in the Cushman case has been overruled in the later case upon which appellant relies. But upon that question the Supreme Court of the United States has itself spoken in Barnitz v. Beverly, and has said: 'The case of Con. M. L. I. Co. v. Cushman, 108 U. S. 51, does not collide with the previous and subsequent cases. There the new statute did not lessen the duty of the mortgagor to pay what he had contracted to pay, nor affect the time of the payment, nor affect any remedy which the mortgagee had by existing law for the enforcement of his contract.' * * * This determination of the Supreme Court of the United States upon one of its own decisions is, of course, absolutely binding upon this court. The essential distinction seems to be that, if the party complaining of the operation of the law is himself not injured by it, if the obligations of *his* contract are not impaired, he cannot be heard to complain, nor will the law be held as to him to violate any of his rights."

In the opinion as printed in the transcript, and in the passage which we have quoted, there are two mis-

takes. The section of the Code of Civil Procedure should be 702 instead of 722, and as amended in 1897 instead of 1879.

But now we do not deny that if the Connecticut Mutual Life Insurance Company v. Cushman is identical with the case now before the court, and if that case, in so far as it determined this particular question, does not collide with Barnitz v. Beverly, and the principle for which we are here contending, that it doubtless is true that that is the end of the matter. But we submit that in the very passage which we have cited from the pen of the learned justice who delivered the opinion of the Supreme Court of California in this case, there is involved a complete contradiction of terms. We are told there that this court held in the Cushman case, that a law passed subsequent to the mortgage, and reducing the interest to be paid to a purchaser at such sale, was operative, and did not interfere with the rights of the purchaser, *whose contract did not exist* until the time of the sale, and was governed by the laws in force at such time.

Now it is submitted that if this is a correct interpretation of the Cushman case, it is in direct conflict with Barnitz v. Beverly. If the contract of the purchaser does not exist until the time of the sale, and is governed by the laws in force at such time, then why, in Barnitz v. Beverly, and in all the cases decided by the Supreme Court of California, is an extension or abridgment of the time of redemption an impairment of the obligation of the contract? Truly, if the purchaser's contract is that only which consisted in his

buying at the sheriff's sale for a price named, the property sold, and that contract is governed by the laws in force at such time, it seems to us that every term of the law of redemption, time as well as the amount, and every other condition existing at the time of his purchase, is the law which is to be looked to for the obligations of his contract, and to determine whether those obligations are impaired or not. And if that is the law, we say again, that all of these cases in California, and Barnitz v. Beverly, as we understand it, were not decided correctly. But, as we have already said, that case has been uniformly followed in the state of California wherever the question has arisen, regardless of who was the purchaser or for what price he purchased. And all proceed upon the theory, and can have no foundation in any other principle, than that those redemption laws were a part of the mortgage contract. And the alteration of them in any substantial particular is an impairment of the obligations of that contract.

Mr. Justice Henshaw further says:

> "It may be added that since the decision in the case of Tuolumne R. Co. v. Sedgwick, 15 Cal. 515, where this question first arose in this state, and where the same conclusion was reached and expressed as by the United States in the Cushman case, the rule in this state has always been the contrary of that contended for by appellant."
>
> Trans. p. 119.

We do not conceive that what the law of this state has been from any point of time upon this subject can have any effect upon the determination of this cause in

this court, except that effect which arises from the respect due, and always accorded by this court, as well as other appellate courts, to the decisions of tribunals of last resort, though those decisions may not have the force of authority upon them. And while no doubt that respect will be given to the decisions of the Supreme Court of California, not merely through courtesy, but because its decisions are justly entitled to respect. Yet nevertheless it is not infallible, and it is respectfully submitted that Mr. Justice Henshaw made a mistake in saying that the decisions of the California court have, since the Tuolumne Redemption Company's case referred to, always been to the contrary of that contended for by us. If we look into the history of the adjudications upon the principles here involved, in the Supreme Court of California, we find that that history has not been unlike the progress of judicial investigation in other states. When these questions first arose in the United States there was a strong inclination to the proposition that redemption laws were not part of the contract but they pertained rather to the remedies for the enforcement of contracts, and that notwithstanding the provisions of the federal constitution, the power of the states over merely remedial regulations was almost unlimited. It was always conceded that to deny all remedy when one had previously existed, did impair the obligation of the contract, but so long as *a* remedy was provided, its comparative efficiency with those provided at some other time were not matters of any importance in the determination of questions like the present.

In Thorne v. City of San Francisco *et al.*, 4 Cal. 127, this question of the relation of laws for executing judgments, including the redemption laws, first came before the Supreme Court of California, and Mr. Justice Wells, in delivering the opinion of the court said:

> "Primarily, two propositions are advanced. The first is: That the Redemption Act, as it is called, does not apply to this case, for the reason that by the rule of construing statutes, it was intended by the law-making power that it should have a prospective, and not a retrospective effect; and for the further reason, that if it was designed to have a retrospective action, then the law is in contravention of that clause of the constitution of the United States which prohibits the several states from passing laws impairing the obligations of contracts."
>
> 4 Cal. 131-132.

These questions are then taken up in their order. And their conclusion is that as to the first question, that it should not be given a retrospective operation.

4 Cal. 131-139.

In taking up the second question, Mr. Justice Wells said:

> "It is contended that the proposition as to retrospective operations of statutes depends upon the constitutional question, and that they must stand or fall together; that the last supports the first, and that the only objection to a retrospective law is, that it impairs the obligations of contracts."

But said he:

> "We think there is a broad difference in the

> two propositions, and being satisfied that our conclusions are correct in regard to the first, we proceed to the second, involving the constitutionality of the law."

In that case the suit on which judgment has been obtained, and under which the respondent's purchase was commenced and proceedings taken, was before the statute providing for redemption took effect, and therefore, thought the learned justice, the right of an absolute sale became vested. And then he said:

> "We would rest here, but that arguments have been urged most strenuously upon the constitutional point. Upon that branch of the subject we are relieved from whatever doubt we may have entertained, not only by our own deliberate consideration of the subject, and the impregnable position of the U. S. Supreme Court in Bronson v. Kinzie, 1 How., but by the confirmation of the doctrine by the same high tribunal in McCracken v. Hayward, 2 How., upon full review."
>
> 4 Cal. 129, 140.

The court then proceed to consider this question, and they declare that the distinction attempted to be made between the obligation and the remedy, was against the principle held in the cases cited. And they said, moreover, that in those cases the view presented is that there might be alterations of the remedy, providing they did not seriously impair it. "Such an admission," says Chancellor Kent, "is dangerous from its liability to misconstruction and abuse."

And then, applying the doctrines to the particular case, they said that by the change of the law, the right

of absolute sale is taken away, and the provision substituted which not only hinders and delays him in recovering his money, but renders him insecure in the hope of it, and might, in many instances, totally destroy his rights by nullifying them.

The result of Thorne's case is that the court there, is in entire accord with this court upon the proposition that redemption laws are a part of the contract, and that if the statute is silent as to redemption, no right of redemption exists, and the fact that it does not exist is a part and parcel of the contract which the legislature cannot change.

This case was approved in Seale v. Mitchell, 5 Cal. 401, 402. It was doubted in Hart v. Burnett, 15 Cal. 530, 587, and overruled by the Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515. And the dissenting opinion of Justice Heydenfeldt in Thorne's case was adopted.

In Moore v. Martin, 38 Cal. 428, 439, and the last clause in this opinion of Moore v. Martin is:

> "Besides, we regard the case of Tuolumne Redemption Company [15 Cal. 515] as overruling the case of Thorne v. The City of San Francisco [4 Cal. 127]."

But in Allen v. Allen, 95 Cal. 184, 205, already cited, the majority of the court held that the right to redeem mortgaged premises was fixed by the law existing in this state at the date of the contract, and could not be affected by subsequent legislation.

In Allen v. Allen, 95 Cal., page 184, the leading opinion was delivered by Justice Paterson, and in his

opinion occurs that which we have quoted, and holding that the law as it existed at the time the deed was made must be read as a part of the contract.

95 Cal. 196-200.

And he distinguished

Oullahan v. Sweeney, 79 Cal. 357,

because in that case the right of redemption was not absolutely extended, but the purchaser was required to do certain things before he could take out a deed. And the right of redemption might thus continue beyond the year by his failure to give the notice prescribed. From his opinion the Honorable Chief Justice dissented. And in the course of his dissenting opinion, and after citing Oullahan v. Sweeney, Chief Justice Beatty said:

> "It is impossible to distinguish that case from this; and if it was correctly decided, there can be no doubt of the power of the legislature to extend the right of a mortgagor to redeem."
>
> 95 Cal. 205.

He subsequently said, on the same page:

> "A decision on this point by the Supreme Court of the United States would of course be binding authority, as the immunity asserted arises under the constitution of the United States; but no such decision has been cited."

Teralta, etc., Co. v. Shaffer, 116 Cal. 523, and the other cases which we have already cited, decided by the Supreme Court of California, will, we think, establish the proposition that the opinions of the Supreme Court of this state have fluctuated upon this

subject, and that subsequently to Allen v. Allen it was said that this decision of this court, which would be a binding authority, ha[illegible]een given, and the case cited was Barnitz v. Bever[illegible].

Now what we especially desire to call attention to here is this fact: that in all the cases in California prior to Hooker v. Burr, there never was one word said that indicated that in the mind of the Supreme Court of California there was any difference between extending or abridging the time of redemption, and increasing or diminishing the amount to be paid on redemption. The discussions in the court of California have been upon the broad question of whether redemption laws were part of the contract, and when the court was of the opinion that they were, as in the 4th California case, they did not say that the time of redemption might not be altered, and that the amount to be paid was subject to legislative determination without regard to whether contracts were prior or subsequent to such legislation, but it was that the redemption laws were part of the contract; and when the court had come to a different conclusion, and in the Tuolumne case in the 15th California Reports, it will be seen by examining the opinion that it never entered into the mind of the court in that case that there was any difference between the two things. They simply reached the conclusion that the contract was the contract made by the purchaser at the time of the sale. In that case they distinctly held that a repeal of a right of redemption, in other words, an act making sale absolute instead of conditional, would not impair

the contract. A debtor in default has no vested right to have his property sold in any particular way, and third persons not parties to the contract have no vested right to purchase the property of a common debtor sold at the instance of another creditor.

> "Whatever rights of the kind exist, pertain solely to the remedy, and exist solely by statute, and the legislature may repeal them at any time before they have been availed of by the parties entitled. To state the proposition in different form: the legislature has no right to alter the terms of a contract already in existence; it has a right to alter the remedy."
>
> 15 Cal. 524.

In Thresher v. Atchison, 117 Cal. 73, which we have before cited, it is there declared emphatically that the legislature was as powerless to diminish the amount which he should receive as redemption from the sale, as to extend the time at which he should be entitled to a conveyance, and take possession of the land. It could, with as much right, authorize a redemption without requiring any payment beyond the amount of the purchase, as it could reduce the amount then required to be paid.

117 Cal., 75-76.

And it is submitted that if there be any distinction between that part of the redemption law which fixes the amount to be paid, and the part which fixes the time within which it is to be paid on redemption, so that laws affecting the amount do not impair the obligation of the contract, while those that affect the time do, such distinction is not made in the California cases, and the

decisions of that court previous to this are not against us.

Now in the opinion in Barnitz v. Beverly, if we leave out that language by which the Cushman case was distinguished, and upon which turns the decision of the Supreme Court of California in this present case, there are many passages which, it seems to us, do collide with the Cushman case. We call attention to the following:

> "The decisions of this court are numerous in which it has been held that the laws which prescribe the mode *of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the constitution of the United States.* But it will be sufficient for our present purpose to mention a few only."

Again:

> "It is the plaintiff's absolute and undoubted right under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the court of chancery and obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgagor. This is his right by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay."

Again:

> "When this contract was made, no statute had been passed by the state changing the rules of

law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court, and it must therefore be governed, and the rights of the parties under it measured, by the rules as above stated. They were the laws of Illinois at the time, and therefore entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed."

41 L. Ed. p. 98.

Again:

After referring to the rights of the parties under the law as they existed at the time of making the contract, and quoting from McCracken v. Hayward, this court said:

"Any subsequent law which denies, obstructs, or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract as much in the one case as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a state legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three-fourths, or nine-tenths, as well as for two-thirds, for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff."

Id. p. 99.

On the same page this court refers to the opinion of Mr. Justice Miller in Brine v. Hartford F. Ins. Co., 96 U. S. 627, wherein it was held that *all the laws of a state existing at the time a mortgage or any other contract is made*, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory upon all courts which assume to give a remedy on such contracts—that the construction, validity and effect of contracts are governed by the law of the place where they are made, and are to be performed, if that be the same—that it is therefore said that these laws enter into and become a part of the contract.

Again:

> "At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the constitution of the United States."
>
> *Id.* p. 100.

Now these passages seem to us to admit of but one interpretation, the laws existing at the date of the contract and all the laws, including the redemption laws, are part of the contract. And they cannot be altered in any substantial particular, because it is an impairment of the obligation of that contract.

In the Cushman case itself is contained an expression which, it is submitted, is not easily reconcilable

with the decision in that case. The part of the opinion referred to is as follows:

> "The statute in force when the mortgage was executed prescribed the rate of interest which the amount paid or bid by the purchaser should bear, as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and the mortgagee. The mortgagor might, perhaps, have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage."
>
> 27 L. Ed. 653.

If the proposition here inserted should be accepted as the final statement of the law, and if the mortgagor could object to an increase in the rate, upon what ground could he object? Certainly no other than that the rate fixed by the law as it existed at the time he entered into the contract was a part, at least, of his contract, and its obligation could not be impaired. If, then, there is one law for the mortgagor and the mortgagee, and another for the purchaser, we should have some strange results under the law in this state. Section 701 of the Code of Civil Procedure is as follows:

> "Sec. 701. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons, or their successors in interest:
>
> "1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

"2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners."

Section 702 we have already copied.

Section 703, so far as necessary to the present illustration, declares:

"If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with two per cent. thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and, in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with two per cent. thereon in addition, and the amounts of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. * * * If the judgment debtor redeem, *he must make the same payments as are required* to effect a re-

demption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate."

One redemptioner may redeem eleven months and a half after the sale. And between that time and the end of the twelve months there may be a half dozen more redemptioners, and finally the judgment debtor may, within twelve months, redeem also, but he must make the same payments as are required of a redemptioner. But if so in the case supposed, he must pay two per cent. not only on the purchase price, but upon all these redemption additions, although those redemptions may have been, the first of them, not more than two weeks before the time he redeems. Now, according to the suggestion in Cushman's case, that increase of the burden on the judgment debtor might take place unless, as there suggested, the law should be held unconstitutional as to him.

It is true that under the law as it stood before, the burden was quite as onerous as it is under the new law, but we spoke only of what may happen under the power of the state, if this distinction exists. A redemptioner may be required to pay what he never can get back from the judgment debtor, because the law existing at the time of the contract is a part of the mortgagor's contract, and not a part of the purchaser's contract.

7. A law either reducing or increasing the amount to be paid for redemption, after the execution of the mortgage contract, does substantially impair the obligation of the contract.

It seems to us that this proposition is quite obvious. The remarks under the last caption, we think, sufficiently show that if the power of the legislature exists to make the change at all, that power must be unlimited. As was said in Barnitz v. Beverly, and in the cases cited therein, especially McCracken v. Hayward, that a subsequent law which superadds a condition that there should be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, affects the obligation of the contract. That this power in a state legislature, if it exists at all, may be carried to any extent, may prohibit a sale for less than the whole appraised value, or for three-quarters, etc. So we say here, if the legislature can reduce the amount of interest to be paid to effect a redemption fifty per cent., it can reduce it a hundred per cent. And if it can declare that a redemption may be made by paying the purchase money without any interest at all, it is not easy to see why they could not equally have said that such redemption may be made by paying ninety per cent. of the purchase money. If we are to look to those laws only which exist at the date that the sale is made, for the purpose of ascertaining the obligations of the purchaser's contract, and he purchases with such a law as just suggested before him as that by which the measure of the obligations of his contract is to be taken, how could it be said that the

obligations of that contract are any more impaired by such legislation subsequent to the mortgage but before the sale, than in the Cushman case? With such a law we know there would simply be no purchasers. If any at all, the mortgagee alone. And in that event, the act would do no more than to say that the mortgage debt might be discounted by the debtor alone, and paid with ninety cents on the dollar.

If we are correct in this, is not the obligation of the contract impaired by such alteration of the remedy under any of the decisions which we have cited? The obligation of the debtor's contract was to pay his creditor so much in money; the creditor had the right to put up the mortgaged property for sale for money, the thing in which his debt was agreed to be discharged. He is not compelled to accept the property in lieu of money, but he has the right to convert it into money, and pay the proceeds upon his mortgage debt. Now, if the legislature had said that if a mortgage debt should not be paid within such time after the decree of foreclosure, that then the mortgagee should take the property, nobody would doubt that such a law impaired the obligation of the contract. We are, of course, assuming that at the time the mortgage was made the law was different. What is the difference between doing this directly and accomplishing the same thing indirectly? Why not say that the property should not be sold at all, just as well as to clog that sale with such conditions, and create in others such rights as against the purchaser as would make it impossible that there should be a purchaser other than

the mortgagee, and that the mortgagee himself would take the property only because he must do so or lose his debt entirely? We submit that such laws do affect the obligations of the contract, and in a substantial and material manner.

8. The delivery of Clark & Bryan's check to the sheriff of Los Angeles county, for the sum of one thousand and seventy dollars, was no redemption, if the amount was sufficient.

The statutes of this state on the subject of execution sales clearly show that by a purchase the purchaser acquires an interest in the land purchased.

Section 700 of the Code of Civil Procedure declares that

> "Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases, the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, containing:
>
> "1. A particular description of the real property sold;
>
> "2. The price bid for each distinct lot or parcel;
>
> "3. The whole price paid.
>
> "4. When subject to redemption, it must be so stated.
>
> "And when the judgment under which the sale

has been made, is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency, in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed by the officer in the office of the recorder of the county."

Section 706 declares:

"Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property * * * on the application of the purchaser or the judgment creditor."

Section 707:

"The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof."

These provisions show that the purchaser does, in advance of the execution of a deed, acquire an interest in the real estate, and it is property of which, it is submitted, that he cannot be divested without due process of law. A redemption, to be sure, may be made, but it must be made in the manner prescribed by the statute, and the statute everywhere clearly indicates that a redemption is to be made in money, and not in anything else. The judgment in this case was made payable in a specified kind of money. Now the check in this case was not payable in gold coin. But if it had been, it would have been no better, for the re-

demption, when made by a payment to the sheriff, cannot be made by a check at all. Of course if the redemption is made directly with the purchaser, he may accept whatsoever he pleases, but the right of redemption is purely a creature of the statute, and a redemptioner must come strictly within the provisions of the statute and show a strict compliance with it.

Haskell v. Manlove, 14 Cal. 57;
Wilcoxson v. Miller, 49 Cal. 194.

As already said, our statute requires the redemption to be made in money, and the sheriff has no authority to receive a check. The very terms employed by the statute show this to be the case.

In order to effect a redemption, the judgment debtor or redemptioner must, within the time mentioned after the sale, pay the purchaser the amount of his purchase, etc.

C. C. P., Sec. 702.

And if the property be redeemed by a redemptioner, another redemptioner may, within sixty days, redeem on *paying* the sum *paid* on said last redemption, etc.

C. C. P., Sec. 703.

But a check is not a payment.

3 Freeman on Executions, 3rd ed., Sec. 320.

In this section, and on page 1880 of the volume, he says:

> "Redemption must be made in money. It may, in the absence of statutes to the contrary, be made in greenbacks, or any other legal tender. It cannot be made in ordinary nor in certified bank checks, nor in certificates of deposit. But if the

officer to whom redemption is required to be made receives the notes of national banks, treats and receipts for them as money, and holds himself ready to pay, and offers to pay, the amount thereof in lawful legal tender, it has been held that the redemption is good. Such officer is deemed to be so far the agent of the person from whom redemption is sought to be made, that he may waive the latter's right to object to a tender or payment by the redemptioner, part of which is in national bank notes, or paper currency. Redemption might formerly, in New York, be made in current bank bills. The purchaser may, however, accept redemption in any mode of payment satisfactory to him. If the sum paid is too little, the redemption is void, unless the deficiency is too trifling to be worthy of consideration, or the sum paid is accepted by the holder of the certificate of purchase without objection. * * * A *tender* in bank notes is good, if not objected to on that account."

But a check is not a payment, even in the ordinary transactions between a debtor and creditor unless it is expressly so agreed.

Dingley v. McDonald, 124 Cal. 90.

Neither is the taking of a promissory note a payment of a debt, or redemption of the amount of the debt.

London & San Francisco Bank v. Parrott, 125 Cal. 417;

Dellapiazza v. Foley, 112 Cal. 380;

Equitable Nat. Bank v. Griffin & Skelley Co., 113 Cal. 692.

But while the purchaser may accept redemption in any mode of payment that is satisfactory to him, the sheriff has no such authority. He is not the agent of the purchaser to do anything or to receive anything or to accept redemption at all, but he is an officer of the law, to whom the payment may be made to effect the redemption, but he has no authority except that which is prescribed by the statute, nor can he accept anything in payment or any mode of payment except what the statute particularly authorizes.

3 Freeman on Executions, Secs. 319-320;
Bennett v. Wilson, 122 Cal. 509, 516;
Thorne v. San Francisco, 4 Cal. 127.

In this case it was directly decided that the sheriff had no authority to receive a check in payment of the amount necessary to effect redemption; and that checks are not payment in ordinary transactions. See further:

Larson v. Breene, 21 Pac. 498;
Beauchamp v. Archer, 58 Cal. 431, 434-435;
Villhac v. Biven, 28 Cal. 409.

And the deposit of a check in court is not sufficient.

Louis v. Lawson, 45 Wis. 353.

Nor does the fact that the party has money in the bank, set apart to meet it, make any difference.

Meyers v. Bymington, 34 Ia. 205;
Te Poel v. Shutt, 78 N. W. 288.

And that a bank certificate of deposit is not available to redeem land sold on execution.

Dougherty v. Hughes, 3 Ia. 92.

Nor is a partial compliance with the redemption laws, of any effect. They must be complied with fully and strictly.

Keeley v. Sanders, 99 U. S. 441;
Parker v. Dacres, 130 U. S. 43.

And in the case of Bennett v. Wilson, 122 Cal. 509, 516, the supreme court of California expressly decided that the sheriff was not made the agent of the purchaser so far as to bind the purchaser by the payment made to the sheriff. That he is authorized to receive the money of a redemptioner or a purchaser from a previous redemptioner, but that the statute did not make the sheriff such an agent as that by receiving the money it would necessarily bind the purchaser or previous redemptioner to accept it.

It will be noticed that in this particular case there were other objections to this check. It was not drawn by Rhodes, the redemptioner, at all, but by Clark & Bryan, and payable to the order of the sheriff.

Now we do not claim that the use of a check in making a redemption does necessarily make the redemption void. That a check may be used as the means of passing money into the hands of the sheriff we do not deny. It does not make any difference by what means the money is paid into the hands of the sheriff. To go to the bank with the redemptioner, there receive a check from him, place it in the bank and receive the money upon it himself, would, of course, effect a redemption. But what we contend for is that a check is not a payment, and that in this case, the check was delivered to the sheriff and held by him

for nearly eleven months. If the check was not a payment, isn't it obvious that no payment was made to the sheriff himself until the time for redemption had expired by nearly a year?

There was no tender of the money to plaintiff. The evidence shows exactly what was done. Mr. Hooker's testimony will be found at pages 32 to 34 of the transcript.

The money was never tendered to him, nor was he ever informed that it had been tendered to his attorney. The attorney of Mr. Hooker was given to understand that the money was in the sheriff's office, but the money was never offered to him. In fact the money was not in the sheriff's office at that time.

But besides that, the admitted facts in the case show that there was no tender of the money, because the sheriff himself didn't have it. Clark did not have it when he called on the sheriff. [Rec. p. 185-187.] The statutes of this state have provided the manner in which a tender may be made, and by which the obligation may be extinguished. In the Civil Code of California it is provided that an obligation is extinguished by an offer of performance made in conformity to the rules herein prescribed, and with intent to extinguish the obligation.

Civil Code, Sec. 1485.

And in section 1502 it is provided that the title to a thing duly offered in performance of an obligation passes to the creditor, if the debtor at the time signifies his intention to that effect.

And in section 1500 it is provided that an obligation

for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited *in the name of the creditor* with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor.

In the Code of Civil Procedure, section 1030, it is provided that when, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

And in section 2074, C. C. P., an offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

In this case it is observable:

1. The money was never, within the time of redemption, paid to the sheriff.

2. The money was never tendered to the plaintiff in this action at all.

3. There was never any offer in writing, to pay him the money.

4. There is no plea in this case on the part of the sheriff, nor any defendant, of a tender of the money to the plaintiff, nor is any tender kept good in the pleadings. For ought that appears, the money is in the custody of the sheriff to this day, and

never has been paid to the plaintiff, nor offered in writing, nor deposited in any bank, nor deposited in court, for the plaintiff.

Upon what principle, then, can it be said that any redemption has been effected? And how was the plaintiff in error divested of the estate in this land acquired by his purchase? It is submitted that in this case, and under this judgment, the plaintiff is declared to have been divested of his property without any compensation or any process of law.

Perhaps a word of explanation should be made here of the cause of making both the sheriff who made the sale and his successor parties defendant in this suit.

Under an act to establish a uniform system of county and township governments, approved April 1, 1897, statutes of 1897, page 452, it is provided in the 103rd section, found in the said statutes, page 481:

> "When any process remains with the sheriff unexecuted in whole or in part, at the time of his death, resignation of office, or at the expiration of his term of office, said process shall be executed by his successor or successors in office; and when the sheriff sells real estate under and by virtue of an execution or order of court, he *or his successors in office* shall execute and deliver to the purchaser or purchasers all such deeds and conveyances as are required by law and necessary for the purpose, and such deeds and conveyances shall be as valid in law as if they had been executed by the sheriff who made the sale."

As the statute provided that either the sheriff who sold, or his successor, could make the deed, we deemed it prudent to tender the money for the deed to each of them, and upon their refusal to execute it, to make both parties to the suit.

Respectfully submitted,

J. S. CHAPMAN,

Attorney for the Plaintiff in Error.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1903.

No. 263.

John D. Hooker,
Plaintiff in Error,

vs.

John Burr, A. W. Rhodes and W. A. Hammel,
Defendants in Error.

CLOSING BRIEF FOR THE PLAINTIFF IN ERROR.

I.

The Court has jurisdiction of this writ.

The proposition that the judgment in this case might have passed upon some other ground than the federal question, is not supported by the transcript, nor is the rule such as is contended for by defendants in error.

When a decision of the state court is on a ground broad enough to sustain the judgment irrespective of the federal question, the supreme court will not take jurisdiction, although the federal question involved may have been decided erroneously.

Hale v. Akers, 132 U. S. 554.

Nor when the decision of the federal question was unnecessary and not decided.

Henderson Bridge Co. v. City of Henderson, 141 U. S. 688.

Where federal question not properly raised, and judgment of the state court proceeded upon an independent ground not involving a federal question, the writ of error to the state court will be dismissed.

Haley v. Breeze, 144 U. S. 132.

When judgment of state court is based on non-federal grounds sufficient to support it.

Hale v. Lewis, 181 U. S. 474.

Nor where record shows a federal and non-federal question in state court, and the case was disposed of below on the latter.

Adams County v. Burlington etc. R. R., 112 U. S. 128.

Where the case is disposed of in the state court before the federal question presented by the

pleadings was reached, and it was not necessary to decide that question.

Crossly v. New Orleans, 108 U. S. 106.

Nor if the judgment of the state court may have been given on grounds which the twenty-fifth section of the judiciary act does not make a cause for error, as well as upon some ground which does come within that section.

Steines v. Franklin County, 14 Wall. 15-23.

To give the supreme court jurisdiction on error to a state court, it must appear in the record that some one of the questions stated in the twenty-fifth section of the judiciary act arose and was applied by the state court in disposing of the controversy.

Id.

These principles are established by innumerable authorities, but no authority goes to the extent of holding that when the opinion of the supreme court of the state is before this court, and the grounds of its decision are apparent, that this court will decline jurisdiction because, forsooth, there were some questions of state law regulating the practice in the state courts, upon which the state court might have made a decision independently of any federal question, though sufficient to sustain the judgment regardless of the federal question, when the record does not disclose that the state tribunal made any such de-

cision. In this case the whole effort of the defendant in error is to show that there were some questions of state law regulating the procedure in the state courts upon which that tribunal might have given a decision, which would have disposed of the case independently of a federal question. But the answer is, the court didn't give any such decision, and besides that, by the very decision which it does give, it shows that those same questions of procedure, every one of which was raised in that court, was decided to the contrary of what is claimed here. If such a doctrine as is contended for in the brief of defendant in error were admissible, there never could be any judgment of a state court reviewable here, since it is always conceivable that some question of state practice might have been decided in such manner as to have terminated the case without any decision upon the merits.

But in our case the opinion of the supreme court of California is before this court as a part of the record, and is to be looked to for the purpose of ascertaining what is decided by that court.

Cousin v. Labatut, 19 How. 202; 15 L. Ed. 601;

Murdock v. Mayor etc. of Memphis, 20 Wall. 633; 22 L. Ed. 429, 443;

Gross v. U. S. Mtg. Co., 108 U. S. 485; 27 L. Ed. 795;

Philadelphia Fire Association v. New York, 119 U. S. 116; 30 L. Ed. 346;
Scudder v. Coler, 175 U. S. 36; 44 L. Ed. 62.

It is sufficient that it appears on the face of the record that a federal question was raised for the decision of the court, and that the judicial mind of the court was exercised upon it, and their decision was against the right claimed under it.

Maxwell v. Newbold, 18 How. 515; 15 L. Ed. 506-508;
Sully v. American Nat. Bank, 178 U. S. 289; 44 L. Ed. 1072;
Gross v. U. S. Mtg. Co., 108 U. S., *supra.*

The federal question here is sufficiently raised in this record.

Sayward v. Denny, 158 U. S. 180; 39 L. Ed. 941.

In this latter case the court considered the manner in which the question must be raised, and among other things, said:

> "The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed.
>
> "7. Or, at all events, it must appear from the record, by clear and necessary intendment, that the federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from

> the record before the state court can be held to have disposed of such federal question by its decision."

See also

Dewey v. Des Moines, 43 L. Ed. 665.

In San Jose Land & Water Co. v. San José Ranch Co., 189 U. S. 177; 47 L. Ed. 765, 768, this court said:

> "While the right under the act of 1887, thus considered, was not originally specially set up and claimed by the plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defense, it is one which appears to have been insisted upon in the argument; and under the rule of this court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed,' that it was fully considered in the opinion of the court and ruled against the plaintiff in error."

And a number of cases are cited in support of that proposition.

In this case, that the question was necessarily involved, does appear from the record. In the complaint the date at which the note and mortgage were given under which the sale was made, is stated, and it is not denied by the answer. The date of the sale under the foreclosure decree is given, and it is not denied.

The federal courts take judicial notice of the public laws of the several states.

Leland v. Wilkinson, 6 Pet. 317; 8 L. Ed. 412;

Owings v. Hull, 9 Pet. 607; 9 L. Ed. 246;

Gormley v. Bunyan, 136 U. S. 635; 34 L. Ed. 1086;

Elwood v. Flannigan, 104 U. S. 568; 26 L. Ed. 842.

The court, therefore, does know judicially that on the date when this mortgage was given, the time of redemption was six months, and the amount to be paid the purchase price and two per cent. a month; and at the time of this sale the time of redemption had been extended to one year, and the amount reduced to one per cent. a month. It does know, by the allegations of the complaint, and not denied in the answer, the precise amount paid by the redemptioner, and that it was redeemed at the rate of one per cent. a month. And the question necessarily arises upon these facts, as to whether the act changing the law of redemption passed subsequently to the execution of the note and mortgage, impaired the obligation of the contract.

Moreover, it is shown by the record that that question was brought to the attention of the state court, considered by it, and decided against the plaintiff in error.

But it is said that it has been decided once before by this court in the case of the Connecticut Mutual Life Insurance Company against Cushman, 108 U. S., p. 50; 27 L. Ed. 648. A sufficient answer to it is that that case did not decide the question at all, nor arise under any law of the state of California, and the question raised here has never been decided.

Moreover, the case of Barnitz v. Beverly has been decided since the Cushman case, and held distinctly that the law existing at the time when the mortgage is made providing for redemption from a sale under decree of foreclosure, is a part of the contract. And it is submitted that no reason is conceivable why a law changing the time of redemption impairs the obligation of that contract, but that a law changing the amount to be paid does not impair it.

II.

If the questions of state practice presented in the brief of counsel for defendants in error can be considered by this Court, there is not one of them that possesses any merit whatever.

As we have said before, the same questions were made in the supreme court of California, and are manifestly decided against the defendants in error, for the court did consider those

questions, notwithstanding the insistence of counsel that it ought not to have done so. It is said that the plea of the judgment under which this foreclosure sale was made, is not sufficient. To prove this, some decisions are cited.

We answer:

1. Both parties are claiming under the judgment and the execution sale. From that sale defendant in error redeemed, and the sheriff executed a deed to him, claiming that it was in pursuance of the said sale. He cannot question the validity of the judgment.

Cornwall v. Davis, 4 L. R. A. 563;
Lewis v. Watson, 22 L. R. A. 297;
Ellis v. White, 61 Ia. 644;
Pool v. Breese, 114 Ill. 594;
Test v. Larch, 76 Ind. 452.

These are all to the effect that one who has successfully set up a judgment to defeat objections made to his discharge in bankruptcy, cannot afterwards question it. That the purchaser at a sheriff's sale cannot, while relying on the title so acquired, impeach the title of the judgment debtor to prevent his recovering the land in ejectment.

That one who accepts damages under condemnation proceedings, cannot dispute the validity of the proceedings.

Of this character are the two last cases cited.

But it is a general rule that the party accepting the benefit of a judgment is estopped to deny its validity.

Pyle v. Yellowhead, 80 Ill. 208;
Sherman v. McKeon, 38 N. Y., 266, 274-275;
Hazel v. Lyden, 32 Pac. 898;
Bryan v. Pinney, 31 Pac. 548.

2. No objection of this character was taken in the court below, and it is not true that one can object in the supreme court of California for the first time, in all cases, that a complaint does not state facts sufficient to constitute a cause of action.

Cushing v. Pyres, 124 Cal. 663, 665.

This objection, technical as it is, if it have any ground upon which to rest, is just one of that character.

3. It is alleged in the complaint in this action, that an execution was duly issued out of the said court on the 16th of May, 1898, and that the sheriff did, under that execution, duly sell the said property.

Trans. p. 2, par. V of the complaint.

This is not denied. Not only not denied, but they do deny that the deed executed by Hammel, the sheriff, to Rhodes under that execution sale was made without right or authority.

Trans. top page 23, margin 40, par. V.

In the affirmative defense, they set up that after the transfer of the judgment to Rhodes, he was unable to find any property, and there was no property out of which the judgment could be satisfied except the property included in said deed of conveyance, and as said property mentioned in the complaint had been sold under the mortgage foreclosure, redemption thereof was the only manner in which he could recover his said debt.

Trans. p. 26, marginal page 46, par. VIII.

The averments that the execution was duly issued, and the sale duly made, and the certificate of sale duly issued, are sufficient allegations, and especially after judgment.

Hill v. Haskins, 51 Cal. 175.

4. The direct, specific averments of the complaint are sufficient without the aid of inferential allegations.

Weller v. Dickson, 93 Cal. 108, 110.

This case distinguishes the case of Young against Wright, 52 Cal. 407, which involves a plea of a judgment of the justice court, and under the common law in pleading a judgment of a court of inferior jurisdiction, it was necessary to allege the facts conferring jurisdiction. And the court held in that case that he who would avail himself of the different manner of pleading the judgment provided by the code, must bring

himself strictly within the code. But this is not so with courts of general jurisdiction, where it never was necessary to aver the jurisdictional facts.

See also:

Rowe v. Blake, 112 Cal. 637, 644;
Clark v. Nordholt, 121 Cal. 26, 28;
Ashton v. Heydenfeldt, 124 Cal. 14, 18.

5. The allegation that the judgment was duly rendered is not objectionable.

The most that could be said of it is that the term is simply ambiguous. But this objection could only be made by a special demurrer. The term *rendered* is frequently used in a sense which manifestly means a completed and final judgment. It is so used C. C. P., Sec. 669, where it is provided that if a party due after a verdict or decision on an issue of fact, and before judgment, the court may nevertheless "render" judgment thereon.

In the case of Weller v. Dickson, *supra,* in the syllabus it is said that a complaint in an action based upon a judgment *rendered* by a court of general jurisdiction, which alleges that the plaintiff recover a judgment from such court, etc.

So in Lawrence v. Martin, 22 Cal. 173, the language of the syllabus is: "A judgment *rendered* upon an unassignable cause of action for a tort is a debt."

In Wallace v. Eldredge, 27 Cal. 498, will be found the same use of the word in the syllabus, and also in the opinion.

27 Cal. 499.

See also

Page 500.

In Beans v. Manuelli and others, 36 Cal. 117, the syllabus is that in pleading a judgment of the probate court, it is not necessary to allege the facts conferring jurisdiction, but the judgment may be stated to have been duly *rendered*.

See also

Crim v. Kessing, 89 Cal. 478;
Hill v. Sherwood, 33 Cal. 474;
Brewster v. Hartley, 37 Cal. 15;
Carpentier v. Thurston, 30 Cal. 123, 125-126;
McCray v. Harazthy, 51 Cal. 146;
Foley v. Foley, 120 Cal. 33;
Painter v. Painter, 113 Cal. 371;
Holt v. Holt, 107 Cal. 258;
Edwards v. Hellings, 103 Cal. 204, 205, 206.

It is unnecessary to multiply authorities to show how frequently the term *rendered* is used as the equivalent of *recovered* a judgment, and used in the codes of California, and in the opinions of judges. See

San Joaquin L. & W. Co. v. West, 99 Cal. 345,

as to when the decision is given.

And the same matter is considered

In re Cook, 72 Cal. 220, 224-230;

Wood v. Etiwanda Water Co., 122 Cal. 152,

In which cases it is held that a judgment is duly rendered when it is duly pronounced and ordered to be entered.

But the enforcement of a judgment does not depend upon its entry or docketing. Without docketing or entering, an execution may be issued, the land levied upon and sold, and the deed executed by the sheriff in fulfillment of the sale, and that not only proves the sale, but also estops the defendant from contraverting the title acquired by it.

Los Angeles County Bank v. Raynor, 61 Cal. 145.

Approved in

Jaynes v. Bullard, 107 Cal. 130, 132;

Riley v. Wright, 117 Cal. 77, 79-80.

There is nothing in any of the objections. There is nothing in the criticisms of the specifications in the statement on motion for a new trial. In the first place, neither the specifications, nor the statement is at all necessary to raise this federal question. It is raised upon the judgment record alone, as hereinbefore shown. Besides, the specifications were held sufficient by the supreme court of California, as is shown by the fact that they did consider these very questions.

Upon the question of the agency of the sheriff, we deem it unnecessary to say more than has already been presented in the opening brief.

III.

It is claimed that if there is a federal question raised such as would authorize the writ, the plaintiff in error is not entitled to any relief.

It is said that we claim that the payment should have been made in gold coin. Upon the record as cited by counsel for the respondents, it is evident that this is so. But the whole point with us in referring to this provision of the statute is not to complain that this redemption money was not paid in gold coin, but to show it was not paid at all. We have cited the provisions of the statute upon this subject for the purpose of proving beyond any question, that the statute meant that redemption should be made by paying the money, not by giving a check.

If there could be any question arising merely from the language of the statute requiring payment to be made in money, that term is used in the provision of the statute referred to, C. C. P. sec. 692, subdivision 4, wherein it is said that if the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this

section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment, in such way as to show it means what it says.

And when redemption is made, if the judgment under which it is made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

C. C. P., Sec. 704.

Under these provisions there is no room for interpretation as to what the statute meant by the term "money", and it is used in the same sense wherever it occurs in the provisions for the sale and redemption of property.

But, say counsel, a check given in payment, and afterwards paid, becomes a valid payment as of the date of its receipt, and for this proposition they cite 1st A. & E. Enc., page 174. We suppose this is a mistake, and it should have been the 18th A. & E. And in the place cited, in the first edition of that work, there is found the exact language quoted by counsel. But in the second edition no such passage occurs, but on the contrary, under the head of Payment by Bill or Draft, it is said that if the bill were actually paid, this will of course operate as a payment of the

debt for which the bill was given, and the payment *so far as regards the original indebtedness,* relates back to the time the bill was given.

22 A. & E., 2nd ed., p. 552.

The only authority cited for this is an English case which we have not had the opportunity to see.

But under the passage quoted by counsel from the first edition, a large number of cases were cited as authority for it, not one of which, to which we have access, has the slightest tendency to support that proposition.

In Washington Nat. Gas Co. v. Johnson, 16 A. 799, it was simply held that the check in that case was accepted in payment of all rents due on the lease.

In Lingenfelter v. Williams, 9 A. 653, the decision was that whether the notes were paid is a question of fact for the jury, to which it was properly submitted.

In Smith v. Miller, 43 N. Y. 171, it was held that the plaintiff could not maintain the suit against the drawer of the check, because he had failed to present it for payment within the time required by law.

In Borne v. First Nat. Bank, 123 Ind. 178; 24 N. E. 173, it was simply decided that a certified check was no exception to the general rule that

a check is not a payment, and especially when it is not the creditor that caused it to be certified.

In this case the testimony is that Mr. Wesley Clark, who was acting for the defendant Rhodes, and was interested with him, caused the check to be certified and took it to the sheriff, and thus delivered it to him. [See testimony of Clark, original page 185-188, print 102-104.]

Mullins v. Brown, 32 Kan. 312; 4 Pac. 305, not only does not sustain the proposition for which it is cited in the Encyclopedia, but is, on the contrary, an authority against the defendants in this case. There the check was made payable to an agent, by him presented to the bank, and the money actually carried to the account of the agent, and the bank then refused to pay the creditor because the agent was indebted to the bank, and the money which was thus deposited had been charged against his indebtedness. The court held it was no payment.

Tiddy v. Harris, 8 S. E. 227, determined nothing except upon the facts of that case, that the check was a payment.

Hunter v. Wetsell, 84 N. Y. 549; 38 Am. Rep. 544, determines nothing to the purpose. There a certain parol sale of goods was claimed to be void under the statute of frauds, because under the statute it was necessary that some part of the purchase price must be paid at the time. A check for $200 was delivered to the vendor, and

accepted by him, and subsequently paid, but he said it was not paid till after the contract was made, and the contention was, that that was not a payment at the time, within the statute of frauds. The court held that it was a good payment and said:

> "It is said, however, that the actual payment of the money, as distinguished from the delivery of the check, was not 'at the time' of the contract, but at some later period. We do not know accurately when the check was paid. It may have been the same day. It may have been within a very few moments. It may not have been till the next day. We are not to presume, for the purpose of making the contract invalid, that it was held beyond the natural and ordinary time. In such event it is a very narrow construction to say that the payment was not made at the time of the contract. The purpose and object of the statute should not be forgotten. Its aim is to substitute some act for mere words, to compel the verbal contract to be accompanied by some fact not likely to be mistaken, and so avoid the dangers of treacherous memory, or downright perjury. The delivery of the check was such an act. Indeed, it would be an entirely reasonable and just construction to say that the delivery of the check and its presentment and payment constituted one continuous transaction, and should be taken as such without reference to the ordinary delay attendant upon turning the check into money. The statute does not mean rigorously, *eo instanti*. It does contemplate that the contract and the payment shall be at the same

> time, in the sense that they constitute parts of one and the same continuous transaction. We think, therefore, there was a payment 'at the time,' within the meaning of the statute, and that the contract of sale was valid."

This is very far from the general proposition that whenever a check is paid, though a year after it is delivered, the payment is as of the date of the delivery of the check.

National Bank of Gloversville v. Wells, 79 N. Y. 500, is another case that simply determines that upon the circumstances of that case, the check was a payment.

Another case cited in the Encyclopedia is

> Comptoir D'Escompte de Paris v. Wm. Dresbach, 78 Cal. 15.

The case is directly against the proposition for which it is cited. The court quoted approvingly from Blair v. Wilson, 28 Gratt. 171, 172, the following passage:

> "The giving of a check for an antecedent debt is not an absolute payment and extinguishment of the debt, in the absence of an agreement giving it that effect. Ordinarily, it is only a means of payment, and the debt will not be extinguished *unless and until the check be paid*, or unless loss be sustained by the drawer in consequence of the laches of the holder, in which case the debt will be discharged in proportion to the loss sustained. If the check be not paid, and the payee is without fault, his right of action

against the drawer for the debt, which has been merely suspended by the giving of the check, revives, and he may have recourse to the drawer, either upon the debt or upon the check, at his option."

Id. p. 21.

But it is claimed by counsel that where redemption is attempted in good faith, and the correct amount paid as required by the law as construed by the highest courts, a change in the construction of such law should not forfeit the redemption, but he should be allowed to perfect it. And several cases are cited which are supposed to support that proposition, and wherein, trivial imperfections and defects in the redemption have been permitted to be cured.

But the first answer to this claim is that the supreme court of California has taken no such view of it. No such judgment has been given, and this court is dealing with the judgment actually pronounced by that court. Besides, there is nothing in this case to commend the defendants to the equitable consideration of this or any other court.

Rhodes was never a creditor of Mrs. Spencer until he bought this judgment, and this two or three months after she had sold the property, and it stood on the records in the name of another party, one Shepherd, and the record shows that he made that purchase for the purpose of mak-

ing himself a redemptioner, and connived and colluded with the grantee in the deed, Mr. Shepherd, and with Mrs. Spencer and others, to obtain this property, and simply as a pure speculation.

In Hervey v. Krost, 19 N. E. 125, the supreme court of Indiana, after saying that the right to acquire a lien upon real estate, by judgment, and the right to sell real estate, either upon execution or decretal order, is derived from, and regulated entirely by the statute, begins, continues and terminates at the will of the legislature, and that redemption is also a statutory right, said:

> "While the courts favor and give a liberal construction to redemption laws in the interest of the debtor and others who are concerned, that the debtor's property shall go towards the payment of his debts *to the full extent of its value,* and to whom the right of redemption may be their only means of protection, it never could have been intended that redemption laws should afford a rapacious creditor the means of speculating out of the property and upon the necessities of his debtor. Accordingly, a creditor who invokes the agencies of the law and exposes the property of his debtor to sale can thereafter do nothing, either by way of redeeming or otherwise, to defeat the title of a purchaser who purchased at the creditor's own sale, except by the authority of a statute fairly giving the rights."
>
> 19 N. E. 127.

The case is approved in Horn v. Indianapolis Nat. Bank, 9 L. R. A. 676, 682. And while the cases may be said not to be exactly parallel, yet we say again, upon the principle and spirit of those decisions, there is nothing in the position of these parties which should induce any court to consider the cause from any other standpoint than that of the statute which created the right, and measured its extent.

We call the attention of the court to another point in this case of Horn against the Indianapolis National Bank, wherein it was held that bringing a suit to redeem from a foreclosure sale will constitute an election on the part of the plaintiff to affirm the sale, and preclude his insisting on its invalidity. Such is the syllabus, and the discussion of that question will be found on pages 681-682.

IV.

Referring again to the sheriff's agency, it is submitted that whatever powers he possessed came exclusively from the statute, and that he had no authority to receive anything else than money is plain from the statutes. Acting as he was under powers derived from the law, he had no authority to receive anything else except money, and this the redemptioner was bound to know as well as the creditor. He had no au-

thority to ask the sheriff what he preferred, nor to act upon the information given him by the sheriff that he preferred a check. He knew, was bound to know, that a check certified at his instance was not a payment, nor did the statute of this state leave the redemptioner under any difficulties or embarrassment on account of the action of the sheriff. If the money had been tendered to the sheriff, and refused by him, the statute made the tender equivalent to the payment, and provided the method by which that tender was to extinguish all obligations, namely, by depositing it in a bank of good repute, notifying the purchaser at the sale that it was at his disposal, or notifying the sheriff to the same effect. He did not make a tender in the first place, nor keep it good in the second. He did not extinguish the obligation, because the statute says exactly what must be done to accomplish it, and not having extinguished it, he owed the obligation still, to pay that money. He owed it when the suit was commenced, and for months afterwards, and the cashing of the check by the sheriff nearly a year after the time of redemption expired, and after the suit was commenced, does not relate back to, and make the payment take effect as of, the time when the check was given the sheriff.

It may be said that these are state questions, and the judgment of the state court is to be followed by this court. But it is submitted that

that is not a correct statement of the situation here. If the supreme court of California had said, true the amendment to the statute cannot impair the obligation of your contract, that redemption could not be made by paying the purchase price and one per cent. per month, but the redemptioner did pay under the statute as it stood at the time the mortgage was made, would it conclude this court, when the exact price paid for the property, the exact sum paid for redemption is before you, and it is simply a question of arithmetic to see that the redemptioner did not pay under the old, but the new, statute? We think not. The jurisdiction of this court could not be evaded by an arbitrary conclusion of the state court upon facts undisputed, and before this court.

And so we say with respect to the time of redemption. If the check was not a payment of the money until it was cashed, the jurisdiction here cannot be avoided by the decision of the supreme court of the state holding that the redemption was within time, for the court has the same facts before it without a controversy between the parties at all, and if the payment did not take place until November 26th, 1899, the redemption was not made within six months, and in all cases of this kind, this court must necessarily determine for itself whether the proper amount was

paid, or paid within the time prescribed by the law, existing at the date of the contract.

It is submitted that the judgment of the supreme court of California should be reversed.

J. S. CHAPMAN,
Attorney for Plaintiff in Error.